



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta ta' l-14 ta' Jannar, 2015

Appell Civili Numru. 81/2013

Michael Axisa ghan-nom ta' Lay Lay Company Limited

vs

L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar

Il-Qorti,

Rat ir-rikors tal-appell tas-socjeta Lay Lay Company Limited tad-19 ta' Dicembru 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Novembru 2013 fl-applikazzjoni PA 1716/09 'to sanction minor differences from PB 2124/87/880/84 to sanction garages as built';

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Rat ir-risposta tal-Awtorita li ssottomettiet li l-appell ghandu jigi michud u d-decizjoni tat-Tribunal konfermata;

Rat l-atti kollha u semghet lid-difensuri tal-partijiet;

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

B'applikazzjoni tat-22 ta' April 2009, fil-fondi 6,7, 8 u 9 fi Triq Guzeppi Vella, c/w Triq Joseph Gravina, Ghaxaq, l-appellant talab "to sanction minor differences from PB 2124/87/880/84 To sanction garages as built".

L-applikazzjoni giet michuda b'rifjut tad-19 ta' Mejju 2010 ghar-raguni segwenti:

"1. The site lies outside the limits for development of Ghaxaq and so it is located in an area which should remain undeveloped and open. The proposed development would run counter to this scheme and would represent unacceptable urban development in the countryside."

Fl-appell taghha l-Perit Catherine Galea ghall-appellant ssottomettiet:

1. li l-applikazzjoni m'hijiex ghal zvilupp gidid.
2. li bil-hrug tal-Permess PB 2124/87/880/84 s-sit kien 'committed' ghal zvilupp wara 1987.
3. li f'din l-applikazzjoni saret talba to sanction alterazzjonijiet minimi mill-permess citat.

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4. li d-Direttorat kien irrakkomanda li l-applikazzjonji tigi milqugha.

5. li nghataw diversi permessi f'sitwazzjonijiet simili.

Fir-rapport taghha l-Awtorita' inter alia kkummentat kif gej:

"5.1.3 This appeal reply is being submitted after the Authority has reconsidered all the facts as presented in file as well as to other events and facts which were traced on this site. The Authority disagrees that the DCC's decision (as inserted in file as per minute 23) did not take ALL the relevant considerations when deciding this application since its decision is in full conformity with previous decisions as taken in PA 5646/98 which as later challenged by applicant through an appeal in front of the Planning Appeals Board and later through the Court of Appeal.

5.1.4 The actual decision of the DCC on which appellant is contending that did not take ALL considerations relating to the existing building was minuted as "Refused 5-0. Justification: proposal is ODZ and this is not a minor difference as per Red 1C"

5.1.5 The Authority will thus explain to the Planning Appeals Board that this decision is a correct and coherent decision when viewed vis-à-vis

a) the relevant policies appertaining to ODZ development as well to

b) the particular planning history of the existing building.

5.1.6 Re A. The site is located outside the development scheme boundary of Ghaxaq and hence, ODZ policies apply. The ground floor consists of a group of private car garages which are not allowed through present policies since such urban development can only be accepted in designated areas such as within scheme boundaries. This application is attempting to sanction the changes that were created during construction of these garages and which include the internal layout, the exterior appearance as well as a different layout of the footprint and which extended the face (facing the ODZ) from the approved 15.5m to a building (which according to the photos) which now occupies a piece of land which extended to 22m. These changes are thus not limited to any particular change but consist of a multiple of changes which involve internal / external / footprint modifications which cannot thus be considered as 'minor' as claimed by appellant. In such circumstances, the DCC Board had to assess the requested changes vis-à-vis the present planning policies which govern ODZ buildings.

5.1.7 The Board is informed that such policies have a general presumption against the granting / alterations of private car garages in such ODZ areas since such development can only be described as urban sprawl in the countryside. In this respect, the DCC's decision is fully compliant with this notion and appellant did not cite any ODZ policies (eg. PDG – Agriculture, Farm Diversification and Stables, December 2007) through which the existing building could be sanctioned.

5.1.8 Re B. The Authority will cite and elaborate to the Planning Appeals Board the particular planning history relating to this site and which show that the DCC's decision as taken on 17th March 2010 is fully compliant with previous decisions by the DCC, the Planning Appeals Board and also as confirmed by the Court of Appeal as will be explained below.

5.1.9 The first permit issued on this site was PB 880/84 and which had granted garages at ground floor level, however the garages which were actually built differ substantially from the approved garages and hence the building which exist on site can only be considered as without permit.

5.1.10 In fact, a previous application had been submitted as per PA 5646/98 To regularise construction of garages. This application had been recommended for refusal by the Directorate and eventually refused by the DCC as per decision taken on 05.02.99 An appeal was lodged in front of the Planning Appeals Board (PAB 126/99 TSC) and which agreed with the DCC refusal that the site is ODZ and the requested sanctioning is considered as excessive. This Board also stated that although there was a permit which granted garages, this permit did not actually constitute any commitment and the Board stated that every decision has to be taken in line with the valid plans and policies at the time of its decision.

Dan il-Bord jidhiru illi f'dan l-istadju, m'hemm l-ebda gustifikazzjoni skond il-pjanijiet u l-policies vigenti sabiex l-izvilupp propost jigi awtorizzat, partikolarment in vista tal-izvilupp madwar is-sit illi ma jikkrea l-ebda 'commitment' illi jimmilita favur il-hrug tal-permess. Wiehed mill-ghanijiet tal-Pjan ta' Struttura huwa sabiex l-izvilupp urban isir biss f'zoni ezistenti u ppjanati ghall-izvilupp u, f'kaz illi dan il-Bord jaccetta l-proposta ta' l-appellant noe, ikun qieghed imur kontra dan l-iskop. Dan il-ghan huwa tradott fil-policies SET 11, SET 12 u BEN 5 illi jipprojbixxu kwalunkwe zvilupp urban 'l barra miz-zona ghall-izvilupp, hlief fuq ragunijiet gustifikati. Ghalhekk, minhabba n-natura urban tal-izvilupp sta ghall-appellant illi jressaq ragunijiet bbazati fuq kwistjonijiet ta' ppjanar illi jiggustifikaw il-ghala l-izvilupp ma jistax isir gewwa z-zona ghall-izvilupp u f'zoni gia mibnija. Fic-cirkostanzi attwali, l-proposta tfalli peress illi l-appellant noe naqas milli jaghmel dan u f'kaz illi dan l-izvilupp jigi permess, ikun sejer

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jikkomprometti z-zona kollha, haga illi tista' issir biss waqt l-iprocessar tal-pjan lokali.

5.1.11 Subsequently, this dismissal by the PAB was challenged in the Court of Appeal where in decision dated 24th June 2004 the Court also dismissed appellant's request for sanctioning and confirmed the PAB refusal decision.

5.1.12 Furthermore, appellant had also lodged an appeal (Court of Appeal) against Enforcement Notices ECF 1354/97 and ECF 1247/98 which were both dismissed by the Planning Appeals Board and these decisions were also confirmed by the Court of Appeal in sentences delivered on 24th June 2004.

5.1.13 In view of the above, the Authority reiterates that there is no contention whether the permit PB 880/84 had created any vested right in favour of applicant due to the fact the appellant chose not to abide with this permit and hence, that permit was not utilized according to law. In this respect, the Authority reiterates the Planning Appeals Board declaration (and as confirmed by the Court of Appeal) that appellant has no vested right and the requested sanctioning is not considered as a minor alteration and cannot be acceptable in an ODZ area. The citation below is the actual minute of the DCC's refusal of this appeal.

DCC 1901110 held on 17 March 2010

Refused 5-0

Justification: Proposal is ODZ and this is not a minor difference as per red 1C.

5.1.14 Additionally, the Authority informs the Board that through the Local Plan exercise, this particular area was not identified as being within the development zone nor as a rural settlement but confirmed as being ODZ where only development which relates to agriculture could be considered. In this particular case, the garages being requested for sanctioning are not in any way related to agriculture and hence can only be described as urban sprawl onto the countryside. For these reasons, the Authority reiterates that there has been no change in policies which could now justify its sanctioning and emphasise that the previous DCC, Planning Appeals Board and Court of Appeal sentences are all still valid and relevant through present policies. In this respect, there is no planning justification which could overturn these decisions and thus the appeal as submitted by appellant in PA 1716/09 should be refused on the same grounds."

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Ra wkoll id-decizjoni ta' dan it-Tribunal diverzament ippresedut tad-9 ta' Gunju 2011;

Ra wkoll is-sentenza tal-Qorti ta' l-Appell tal-31 ta' Mejju 2012 li hassret id-decizjoni tat-Tribunal tad-9 ta' Gunju 2011 u rremettiet l-atti lura li dan it-Tribunal sabiex l-appell jerga' jinstema' mill-gdid; it-Tribunal ghalhekk irid jezamina mill-gdid dan l-appell u jiddeciedi dawk il-kwistjonijiet legali u sottomissjonijiet maghmula mis-socjeta' appellanti;

Ra s-sottomissjonijiet tal-Perit Catherine Galea pprezentanti f'isem l-appellant fis-26 ta' Frar 2013 li jaqraw kif gej:-

“Prior to the submission of the above application, I recall discussing this application with Dr. Ian Stafrace and Mr. Igor Robinich. Both officers were confident that this application should have a positive recommendation in view that in the PAPB Permit PB 2124/87/880/84, there were four garages approved and on site 4 garages were built and the take up of land was more or less the same. Thus an application was submitted on 22 April 2009 and this was validated on 4 June 2009. On the 13 August 2009, I received a letter from the case officer requesting further information, to which I answered by my letter of the 11 September 2009.

On 15 February 2010, the Development Permit Application Report was issued, recommending an approval to this application. Notwithstanding the above, and against the Directorate's positive Recommendation, the Development Control Commission refused the application.

Attached please find copies of:

- (i) PAPB Permit PB 2124/87/880/84.
- (ii) Copy of correspondence 13/08/09 and 11109/09 and submitted drawings (plans, elevations, Block plan & 1967 Survey sheet).
- (iii) DPA Report.
- (iv) Drawing showing the superimposition of what was permitted and what was built and the respective areas; as can be verified the built up area is less than the area which was originally approved.”;

Ra d-dokumenti kollha imsemmija mill-Perit Catherine Galea fis-sottomissjonijiet taghha t'hawn fuq;

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Ra l-verbal tat-30 ta' April 2013 fejn it-Tribunal zamm access fis-sit mertu mertu ta' dan l-appell. Waqt l-access gie kkostatat li hemm erba' garaxxijiet mibnija. It-tarag illi jidher fuq il-pjanta fil-fatt ma sarx u jidher ukoll illi l-erba' garaxxijiet in kwistjoni ma nbnewx skond il-permess approvat mill-PAPB ghalkemm jidher illi l-erba' garaxxijiet in kwistjoni nbnew fuq footprint ikbar minn dik li hemm fil-pjanta ghalkemm l-ammont ta' square metres huwa izghar. Il-footprint kienet differenti u l-configuration mhux l-istess;

Ra l-verbal registrat waqt is-seduta tal-20 ta' Settembru 2013 fejn, dwar il-verbal tal-access, inghad dan li gej:-

“L-Awtorita' taghmel referenza ghall-verbal tal-access mizmum fit-30 ta' April 2013 fejn issemmi 'skond il-permess approvat mill-PAPB' u tirrileva li skond id-decizjoni tal-Bord tal-Appell (PAB 126/99) u kkkonfermat ukoll mill-Qorti tal-Appell ghar-ragunijiet hemm imsemmija, il-PAPB effettivament kien ta rifjut u mhux permess.

It-Tribunal jordna li jigi allegat PAB 126/99 ma' dan il-process in vista tal-fatt illi dan jincidi il-validita' tal-permess tal-PAPB numru 2124/87/880/84.

It-Tribunal, b'referenza ghal verbal tal-access datat 30 ta' April 2013 jippreciza illi fejn qed jinghad illi l-garaxxijiet ma nbnewx skond il-permess approvat mill-PAPB, din l-informazzjoni nghatat lilu mill-appellant.”;

Ra l-PAB file 126/99 u PAPB file 2124/87/880/84;

Ra s-sottomissjonijiet tal-Avukat Dr. Philip Magri ghall-appellant li jaqraw kif gej:-

“Illi din in-nota ta' sottomissjonijiet qed issr a tenur tal-verbal ta' dan l-Onorabbli Tribunal tal-4 ta' Ottubru 2013;

Illi l-appell hawn trattat jikkoncerna applikazzjoni mressqa mill-appellant sabiex jissanzjona xi differenzi bejn il-pjanti kif approvati permezz tal-permess bin-numru 2124/87/880/84 u dak li fil-prezent hemm mibni fuq is-sit li jikkonsisti f'erba garages bin-numru 6, 7, 8 u 9 fi Triq Guzeppi Vella, kantuniera ma Triq Joseph Gravina, Ghaxaq;

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Illi qabel xejn wiehed ma ghzndux jinsa li dan l-appell qiegħed jinstema minn dan it-Tribunal wara li l-Onor. Qorti tal-Appell ddecidiet l-appell tal-esponenti billi hassret u rrevokat u annullat għall-fmijiet u effetti kollha tal-Ligi, d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar fl-ismijiet premissi "Michael Axisa għan-nom ta' Lay Lay Company Limited vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar" datata 9 ta' Gunju 2011 (Appell Numru 1531101CF) u konsegwentement bagħtet lura u rrinvijat l-atti lura lit-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar li jista' jiehu konjizzjoni tal-kaz skont il-ligi, sabiex fid-dawl ta' dak deciz f'dik is-sentenza jiddisponi mill-kaz skond il-ligi.

Il-Qorti tal-appell kienet laqgħet l-appell għaliex dak iz-zmien it-Tribunal ta' Revizjoni ma kienx ta' kaz l-aggravji tal-appellanti. Fi kliem l-istess Qorti tal-Appell:

Illi fil-fatt minn qari tad-decizjoni jidher li din qagħdet fuq ir- rapport ta' Martin Scicluna datat 23 ta' Lulju 2010, li kull ma għamel kien biss li ta' storja ta' dan il-permess u lizvilupp u bl- ebda mod ma ikkonsidra lanqas minimament dak sotto mess mill- appellanti u allura proprju l-aggravji tal-istess. Anzi jidher li huwa tratta l-istess applikazzjoni odjerna bħala wahda qisu fuq l-istess sit ma kienx hemm għa permess ezistenti u allura kull ma għamel kien li applika l-policies vigenti għall applikazzjoni li kienet qisha qed titlob li jinhareg permess għall zvilupp l-ewwel darba fuq 1- istess sit li huwa ODZ Ovvjament minn dak sottomess dan ma kienx il-kaz li l-istess socjeta' appellant sottometiet għall konsiderazzjoni tal-Bord u llum it-Tribunal, u jidher li dan ir- rapport għaliex lanqas jibda sabiex jindirizza l-aggravji tas- socjeta' appellant -aggravji li jekk jinqara r-rapport qishom lanqas hiss saru għaliex l-applikazzjoni giet trattata qisu fuq 1- istess sit ma kienx hemm permess, tant li lanqas ingħata kaz ta' d-Direttorat kien irrakomanda li tali applikazzjoni tigi milqugħa. Il-Qorti mhux qed tghid li la darba d-Direttorat ben irrakomanda hekk mela allura l-Awtorita' kellha timxi mal-istess, izda certament li jekk l-Awtorita' ma taqbilx miegħu, kellha tagħti ragunijiet specifici għaliex qed tinjora l-istess rapport, izda li tinjora għall kollox l-istess, certament ma huwiex accettabbli u zgur li jkser id-drittijiet ta' parti li għandha dritt għal smiegh xieraq u wkoll li sottomissjonijiettagħha jigu kkunsidrati, u mhux injorati qieshom ma sarux.

Huwa car li għall-Qorti kien hemm permess fuq is-sit u l-applikazzjoni kellha għalhekk titqies ukoll f' dak id-dawl, Dan il-fatt jikkontrasta sew ma dak li gie verbalizzat mill-Awtorita fis-seduta tal-d ta' Ottubru 2013. Huwa car li l-allegazzjoni ta' l-Awtorita (kif verbalizzata) li ma kienx hemm permess (jew li l-permess kien gie rifjutat, hija falza. Il-Qorti tal-Appell, fis-sunt ikkwotat tghid bl-aktar mod car li l-applikazzjoni kellha tigi ttrattata a bazi ta permess ezistenti fuq is-sit. Il-Qorti tal-Appell tat, għalhekk direzzjoni cara lit-Tribunal li ma jistgħax jigi injorat. Is-suggeriment tal-Awtorita fis-seduta tal-4 ta' Ottubru twassal għali sitwazzjoni

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perversa ghaliex tistieden lit-Tribunal jagixxi kontra dak li gie deciz espressament mill-Qorti.

Dwar l-aggravji kollha per se, l-esponenti ma jistghax ma jergax itenni s-sottomisjoni gia maghmula li qiehdin jigu riprodotti hawnhekk ghall-beneficju tal-Bord.

Illi l-appellant jibda sabiex l-ewwel u qabel kollox jaghmel referenza shiha ghall-kontenut tar-rapport mahrug mill-case officer li ha hsieb l-iprocessar ta' l-applikazzjoni hawn trattata minn fejn jirrizulta li r-rakomandazzjoni tieghu kienet dik illi jinhareg il-permess mitlub. Ir-raguni gusta u fondata moghtija f'dan ir-rapport favur l-akkoljiment ta' l-applikazzjoni in kwistjoni hija s-segwenti:

"According to document BC (floor plan and elevation), the existing garages are currently covering an approximate site area of 141sq.m. (the yard of the fourth garage included in the calculation of the floor area) and has an overall height of 3.4m (taken along the access road). It was observed that the building permit PB 880/84 limited the floor area of the garages at ground floor level to 154sq.m.

and the overall height (including the roof slab) to 3.4m (see 3C). Thus, the request for sanctioning is considered to be compliant with the objectives of Structure Plan policies AHF I and SET 11 since the existing building as constructed did not lead to the further take-up of fresh land (the existing building is covering an area which is less than that approved) and the approved height (including the roof slab) was also retained.

Omissis

The proposed development is being favourably considered and thus it is being recommended for approval since it did not lead to the further take-up of fresh land, retained the approved height (including the roof slab), does not have an adverse impact on the surrounding environment and aims to minimize the visual impact of the existing building on the surrounding countryside."

Illi nonostante tali rakkomandazzjoni, il-Kummissjoni ghall-Kontroll ta' l-Izvilupp ghazlet illi tichad it-talba ta' l-appellant ghal hrug tal-permess kif mitlub u dan billi kkunsidrat is-sit bhala li jinsab barra miz-zona ta' l-Izvilupp ghar-ral tal-Ghaxxa minghajr ma qiset il-commitment li kkrejat l-istess Awtorita bil-hrug tal-permess bin-numru 880/84;

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Illi ghalhekk il-fulcrum ta' l-appell odjem huwa dwar jekk il-Kummissjoni ghall-Kontroll ta' l-Izvilupp kienetx korretta meta ghazlet li tiskarta ghal kollox l-esistenza tal-permess mahrug fug is-sit mertu ta' l-appell odjem u titratta l-applikazzjoni in kwistjoni bhala wahda koncemanti art bla ebda storja ta' permessi fugha u cioe fejn l-intervent propost huwa intervent fuq art fejn id-destinazzjoni taghha qatt ma giediskuss u deciz qabel;

Illi l-appellant bir-rispett jirreferi lil dan l-Onorabbli Tribunal ghal diversi sentenzi li jitrattaw il-punt dwar id-drittijiet kweziti u fosthom hemm is-segwenti:

Renato Costigan vs Malta Drydocks Corporation et (deciza mill-Qorti ta' l-Appell (Sede Inferjuri) fid-19 ta' Ottubru, 2005) fejn l-Onorabbli Qorti rriteniet hekk:

"Id-delimitazzjoni tan-normi l-godda introdotti giet bosta drabi operata billi wiehed jirrikorri ghal dak maghruf bhala d-dritt kwezit li jfisser li n-normi l- godda jridu jirrispettaw dawk id-drittijiet li jkunu twieldu minn fatt akkwizittiv u validu taht il-ligijiet ezistenti u li jkunu allura gja jiformaw parti mill- partimonju ta' l-individwu"

Il-Qorti komplet biex taghti rijassunt ta' zewg sentenzi ohra li jispjegaw il-principju minnha elucidat u cioe Michele Muscat vs L-Onorevoli Roberto Briffa Collettore delle Dogane (deciza mill-Prim' Awla tal-Qorti Civili fit-12 ta' April 1919 - Kollez. Vol. XXIV PI! p.16) u Chev. Antonio Cassar Torregiani noe vs Nutar Dr. Vincenzo Gatt noe (deciza mill-Appell fit-12 ta' Mejju 1950 - Kollez. Vol. XXXIV PI p.148) fejn f'din ta' l-ahhar il-Qorti rriteniet illi: "sew jekk id-dritt kwezit ikun kompjut, sew jekk ikun l-origini ta' fatt li jkun gara that il-ligi precedenti, u d-dritt skond dik il-ligijkun perfett u kompjut, u fl-istess hin ikun dahal fil-partimonju ta' min jirreklamah, u l-okkazzjoni ta' l-esercizzju tieghu tipprezenta ruhha that il-ligi l-gdida, jl-ewwel ipotesi ghaliex ir-retroattivita hija mpossibbli u assurda, u fit-tieni ipotesi l-ghaliex l-istess dritt ikun perfett that il-ligi antika qabel ma nholqot l-okkazzjoni ta' l-esercizzju tieghu that il-ligi gdida, l-istess ghandu jigi rispeuat, u l-ligi l-gdida m 'ghandhiex, skond il- principji elementary tal-gustizzja u l-ekwita, ikollha setgha fuq.

Fuq l-istess binarji hija s-sentenza fl-ismijiet Jack M.A. Olin et vs Anthony Sant Portanier noe (deciza mill-Qorti ta' l-Appell (Sede Inferjuri) fis-6 ta' Ottubru, 2010).

Emanuel Mifsud vs Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp (deciza mill-Qorti ta' l-Appell (Sede Superjuri) tirreferi direttament ghall-ghoti ta' permess ghall-izvilupp u d-drittijiet kweziti akkwistati minn minjkun inghata tali permess u tghid hekk:

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"Applikati dawn il-principji ghall-kaz odjem, irid jinghad li l-fatt li l-appellant intavola applikazzjoni quddiem il-P APB, (liema awtorita cahdet it-talba tieghu ghaliex ma kienetx konformi mar-regoli vigenti dak iz-zmien), certament ma jikkreax ebda dritt kwezit fl-appellant li l-applikazzjoni succedenti li ghamel quddiem l-awtorita l-gdida, cioe l-Awtorita ta' l-Ippjanar, tigi regolata skond ir-regoli anterjuri. Kien ikun differenti l-kaz li kieku l-applikazzjoni tieghu lill-PAPB giet akkolta. L-Awtorita ta' l-Ippjanar kienet tkun marbuta li tirrikonoxxi permess li jkun hareg il-P APB, rnhux biss that il-principji generali tad-dritt (billi l-att jkun gie kompjut), izda wkoll ghaliex il-ligi espressament tghidu... " (Sottolinejar mizjud mill-appellant sabiex is sir enfazi fuq tali kliem hekk sottolinejat).

Applikat it-tagħlim tal-Qrati tagħna għall-fattispecie tal-kaz odjern, jirrizulta kif is-sit mertu ta' dan l-appell huwa wiehed munit bil-permess għall-izvilupp bin-numru 880/84 u b'hekk appena kif dak iz-zmien id-Dipartiment tax-Xogħolijiet hareg tali permess, holoq dritt kwezit fidejn l-appellant u l-Kummissjoni ma setghatx illum b'mod retroattiv u abbuzivament, twarrab l-esistenza ta' l-irnsenmi permess b'mod li tannulla tali dritt li jgawdi minnu l-appellant kif fil-fatt ghamlet meta kkunsidrat l-applikazzjoni in kwistjoni bil-policies viggenti llum minghajr ma rat x'kien il-commitment fuq is-sit li nholoq sa mis-sena 1987 bil-hrug tal-permess, kif hawn spjegat.

L-argument li qed tressaq illum l-Awtorita in sostenn tar-rifjut mahrug mill-Kummissjoni huwa totalment oppost għal posizzjoni mehuda mill-istess Awtorita bl-agir tagħha kif ser jigi hawn spejgat. Fir-risposta tagħha għall-appell hawn trattat, l-Awtorita bi skop qed tirreferi għal binja bhala wahda li ma hijiex koperta bl-ebda permess, mentri l-konsiderazzjoni li għandha ssir hija jekk hemmx permess validu li nhareg fuq is-sit mertu ta' dan l-appell. Ir-risposta hija wahda cara u kkonfermata anke mill-agir ta' l-Awtorita stess li twassal certament għal konkluzjoni li hemm permess validu li nhareg fuq is-sit, liema permess jikkreja commitment li għandha tigi onorata da parti ta' l-Awtorita billi takkolji t-talba għal hrug ta' permess sabiex jigu sanzjonati l-garaxxijiet kif mibnija.

L-ewwel u qabel kollox terga ssir referenza shiha għad-DPA report minn fejn jirrizulta car kif il-case officer li ha hsieb l-iprocessar ta' l-applikazzjoni odjema hass li dak li qed jinghad illum mill-appellant permezz tas-sottomissjonijiet tieghu kien korrett, ghaliex jirrizulta kif hu hass li ma setghax jiskarta l-esistenza tal-permess mahrug fis-sena 1987 u bbaza ir-rakkomandazzjoni tieghu proprju fuq dan il-fattur.

In oltre l-appellant jagħmel referenza shiha għaz-zewg avvizi biex tieqaf uta' twettiq li nhargu fuq is-sit mertu ta' l-appell odjem minn fejn il-posizzjoni addottata mill-Awtorita hija ferm aktar cara. Fl-20 ta' Awissu 1998, l-Awtorita haregt avviz biex tieqaf u ta' twettiq fuq is-sit in kwistjoni u l-ksur gie hemm dikjarat bhala li jikkonsisti

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filli: "Ghandek zvilupp li jikkonsisti f'garages minghajr permessji: Site at Triq Guzeppi Vella clw Triq Joseph Gravina - Ghaxaq" u l-ordni moghtija lill-appellant kienet dik illi "Tregga lura kull haga li ghandek minghajr permess ghal l-istat originali tieghu fi zmien 16 il-gurnata". Madanakollu fit-30 ta' Ottubru ta' l-istess sena, dan l-ewwel avviz gie ritirat, wara li l-Awtorita giet informata bl-esistenza tal-fuq imsemmi permess, u minnflok inhareg avviz gdid bid-data tad-29 ta' ottubru 1998 li jiddeskrivi l-ksur bhala: "Garages mhux mibnija skond il-pjanti approvatafil permess PB21241871880184 datat 04105187" u l-ordni moghtija lill-appellant kienet dik illi "Tregga lura kull haga li ghandek mhux skond il-pjanta approvata fil-permess PB21241871880184 datat 04105187 fi zmien 16 il-gurnata". Danjaghti prova tal-fatt illi fis-sena 1998, u tnax il-sena wara l-hrug tal-permess hawn in ezami, l-Awtorita rrikonoxxiet il-validita ta' dan il-permess billi ghamlet referenza specifika ghalih fl-avviz.

Fil-fatt hija l-ligi stess, cioe l-Att dwar l-Ambjent u l-Ippjanar ta' l-Izvilupp (Kap. 504 tal-Ligijiet ta' Malta) illi tirrikonoxxi l-principju importanti li permessimahruga fuq sit partikolari m'ghandhomxjigu skartati u dan billi tipprovdi hekk:

fejn fl-artikolu 69 jitkellem dwar il-pjanijiet u l-policies li ghandhom jigu applikati fir-rigward ta' applikazzjoni maghmula lill-Awtorita - "Izda l-pjanijiet sussidjarji u l-policies m'ghandhomx ikunu applikati retroattivament b'mod li jkunu jolqtu b'mod kuntrarju drittijiet akkwiziti li jirrizultaw minn permess ta' zvilupp validu".

fejn fl-artikolu 86 jitratta dwar il-procedura ta' twettiq, jirrikonoxxi l-validita ta' permess anke jekk l-izvilupp imwettaq ma jkunx konformi mal-kundizzjonijiet tal-permess billi jghid illi l-Avviz ghandu jinhareg avviz sabiex jizgura konformita ma tali kundizzjonijiet u is-sub artikolu (7) ta' dan l-artikolu jispjega illi: "u b'mod partikolari, izda minghajr pregudizzju ghall-generalita ta' dak hawn aktar qabel imsemmi kull avviz bhal dak jista', ghall-ghanijiet imsemmija, jehtieg id-demolizzjoni Jew tibdil ta' kull bini jew xogholijiet. il-waqfzen ta' xi uzu ta' art, Jew li jsiru fuq l-art ta' kull operazzjoni ta' bini Jew operazzjonijiet ohra." (Sottolinejar mizjud mill-appellant sabiex issir enfazi fuq tali kliem hekk sottolinejat).

Jigi sottomess bir-rispett, illi l-artikoli hawn citati jirrifletu l-artikolu l-qodma li kienu nkluzi taht l-Att dwar l-Ippjanar (Kap. 504 tal-Ligijiet ta' Malta) u ghalhekk il-posizzjoni legali ma imbidlet bl-ebda mod bid-dhul fis-sehh ta' l-Kap. 504 fuq imsemmi.

Dak hawn sottomess ghalhekk juri kif l-Kummissjoni kienet skorretta meta naqset milli tirrikonoxxi l-validita tal-permess bin-numru 880/84 mahrug fuq is-sit in kwistjoni u minnflok kellha tikkunsidra tali permess u tghaddi sabiex taghmel il-

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kunsiderazzjonijiet li saru mill-case officer kif fuq spjegat dwar l-entita ta' l-izvilupp li qed jigi propost sabiex jigi sanzjonat. L-Awtorita hija legalment zbaljata meta fir-risposta taghha qed tressaq bhala argument favur taghha, u a favur ir-rifjut ta' l-applikazzjoni hawn trattata, ir-rifjut koncemanti l-applikazzjoni li gja saret mill-appellant bin-numru 5646/98. L- applikazzjoni hawn trattataghandha tigi kkunsidrata fuq il-mertu taghha indipendentement mill-kunsiderazzjonijiet li gja saru frr-rigward l-applikazzjonil-ohra hawn imsemmija u dan billi kieku dan l-Onorabbli Tribunal kellu jaddotta din 1- attitudni fil-konfront ta' l-appell odjern, jkun qieghed jabdika mill-poter u mid- diskrezzjoni tieghu li jexamina fis-shih l-applikazzjoni li tkun waslet quddiemu tramite l-appell u b'hekk icahhad lill-appellant minn smiegh xieraq ta' l-ilment tieghu.

Fil-fatt jirrizulta evidenti li l-izvilupp li qed jigi propost permezz ta' l-applikazzjoni hawn in ezami huwa differenti minn dak li gja gie propost permezz ta' l-applikazzjoni bin-numru 5646/98 u dan billi filwaqt illi fl-applikazzjoni 5646/98 kien qed jigi propost sanzjonar ta' sitt garaxxijiet hawn si tratta ta' erba garaxxijiet, u cioe l-istess numru ta' garaxxijiet li gja kienu permessi skond l-ewwel permess li hareg fis-sena 1987 u wkoll, kif osserva l-case officer, "the existing building is covering an area which is less than that approved) and the approved height (including the roof slab) was also retained".

Fil-fatt l-appellant gja ghamel xogholijiet fejn regga lura s-sit sabiex jkun aktar konformi ma dak li hemm fil-permess 880/84. Ghaldastant l-iskop ta' l-applikazzjoni hawn trattata kien biss dak illi jissanzjona d-differenzi minuri li rrizultaw minhabba s-site configuration.

Tenut kont ta' dak hawn sottomess, l-Kummissjoni ma kellhiex ghalhekk tikkunsidra l-izvilupp li qed jigi propost sabiex jigi sanzjonat bhala wiehed li ghandu jigi ezaminat that il-policies viggenti rigwardanti l-izviluppi li jinsabu barra miz-zona ta' l-izvilupp.

Finalment, l-appellant jaghmel referenza wkoll ghad-dokumenti minnu pprezentati fl-4 ta' Ottubru 2010 li permezz taghhom inghatat prova cara dwar kif kien hemm diversi permessi ohrajn li gew mahruqa mill-Awtorita nonostant li s-siti koncemati kienu lkoll jinsabu l-barra miz-zona ta' l-izvilupp, u cioe li kien jinsabu fl-istess posizzjoni ta' l-appellant. Uhud minn dawn il-permessi inhargu sabiex jissanzjonaw zvilupp li kien sar u li ma kienu konformi ma permessi gja mahruqa u cioe l-applikanti relattivi kienu fl- istess posizzjoni li jinsab fiha l-appellant. Dan l-agir da parti ta' 1-Awtorita jammonta ghal agir diskriminatorju ghad-dannu ta' l-appellant u dan billi huwa qed jigi trattat b'mod differenti anke jekk il-kaz tieghu huwa ugwali bhal dak ta' persuni ohra li fil- konfront taghhom hareg permess validu tal-bini, kif evidenti mid-dokumenti hawn fuq imsemmija, u ma tezisti ebda gustifikazzjoni legali ghal tali trattament differenti."

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Innota li l-Awtorita' ma wiegbitx ghas-sottomissjonijiet tal-appellant;

Ikkunsidra ulterjorment:

Illi dan l-appell jitratta dwar 'to sanction minor differences from PB 2124/87/880/84 – to sanction garages as built' fi 6,7, 8, 9, Triq Guzeppi Vella c/w Triq Joseph Gravina, Ghaxaq.

Il-permess gie rifjutat mill-Awtorita'ghar-raguni li gejja:

1. The site lies outside the limits for development of Ghaxaq and so it is located in an area which should remain undeveloped and open. The proposed development would run counter to this scheme and would represent unacceptable urban development in the countryside.

Ikkunsidra ulterjorment:

Kif irrizulta mill-permess l-kwistjoni mhix xi wahda ricenti – anzi ghall-kuntrarju diga ha l-kors tieghu l-process kollu – billi fuq applikazzjoni tista' tghid identika, kien hemm rifjut; sar appell li gie michud mill-Bord ta' l-Appell dwar l-lppjanar; sar appell lill-Qorti – li gie wkoll michud.

Is-sit in kwistjoni hu definittivament ODZ – cjoe' barra z-zona ta' l-izvilupp – hekk kien definit u klassifikat fil-bidu tal-process – u hekk gie kkonfermat wara li gie konkluz l-Pjan Lokali ghal din l-area partikolari.

Bl-applikazzjoni PA 5646/98 – l-appellant talab permess "to regularise construction of garages", bl-applikazzjoni prezenti, mertu ta' dan l-Appell PA 1716/09, l-appellant qed jitlob 'to sanction minor differences – to sanction garage as built'.

L-applikazzjonijiet jirreferu t-tnejn ghall-istess sit – u m'hemmx dubbju li bit-tieni applikazzjoni l-process rega gie ripetut u fil-frattemp l-illegalita' baqghet fuq is-sit impunement.

M'hemm l-ebda gustifikazzjoni fil-kuntest tal-Policies tal-Pjan ta' Struttura, li s-sanctioning propost jigi approvat. L-izvilupp ta' garaxxijiet hu wiehed urban u ma jistax jigi approvat f'area li hi barra z-zona ta' l-izvilupp. Skond l-istess Policies,

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f'area ODZ eccezjonalment jista' jigi approvat zvilupp relatat mal-agrikoltura; izda ma jistax jigi approvat dak li qed jigi propost mill-appellant.

Finalment issir referenza ghad-decizjoni tal-Bord ta' l-Appell dwar l-Ippjanar PAB 126/99 TSC tal-20 ta' Awwissu 2003, decizjoni kkonfermata mill-Qorti ta' l-Appell fl-24 ta' Gunju 2004.

It-Tribunal ghalhekk qed jiddisponi minn dan l-Appell, billi jichad l-istess u jikkonferma r-rifjut ta' l-Awtorita' tad-19 ta' Mejju 2010.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. Id-decizjoni hi nulla gax mhix motivata u hi imsejsa fuq konsiderazzjonijiet irrelevanti;
2. It-Tribunal injora kompletament il-parametri ghad-decizjoni li kienu tpoggew mill-Qorti tal-Appell fis-sentenza tieghu tal-31 ta' Mejju 2012 (App 22/2011);
3. It-Tribunal naqas li jikkonsidra l-aggravji li tressqu mill-appellant u minflok iddecieda fuq premissi li ma ghandhom x'jaqsmu xejn.

L-aggravji mehudin flimkien

Dawn l-aggravji jridu bil-fors jittiehdu fil-perspettiva ta' dak li iddecidiet il-Qorti tal-Appell fis-sentenza tal-31 ta' Mejju 2012 li irrevokat id-decizjoni tat-Tribunal u baghtet lura l-atti lit-Tribunal biex jerga' jiddeciedi l-appell mill-gdid.

F'dik is-sentenza l-Qorti qalet illi d-decizjoni tat-Tribunal ma kinitx hadet kont tal-aggravji tal-appellant cioe (1) l-applikazzjoni ma kinitx ghal new development; (2) is-sit kien gie kommess bil-permess PB 2124/87/880/84; (3) illi din l-applikazzjoni kienet intiza biss ghal sanzjonar ta' differenzi minuri mill-permess originali u illi d-direttorat kien irrakomanda l-

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approvazzjoni; (4) applikazzjonijiet ghal talbiet minuri minn permessi mahruqa mill-PAPB inghataw precedentement.

Il-Qorti tal-Appell qalet illi t-Tribunal kien strah fuq ix-xieha li ta rapprezentant tal-Awtorita minghajr ma imbaghad ikkonsidra l-aggravji tal-appellant, anzi qies l-applikazzjoni bhala wahda ghal zvilupp li qed isir ghall-ewwel darba minghajr ma qies l-effett u l-portata tal-permess PB 2124/87/880/84.

Din il-Qorti tqis illi t-Tribunal li ghandu rega' gew rimessi l-atti kellu jara l-appell mill-ottika tal-aggravji u jara jekk fic-cirkostanzi kinitx gustifikata o meno d-decizjoni li kienet hadet l-Awtorita. Din il-Qorti qed taghmilha cara illi l-obbligu tat-Tribunal kien li jikkonsidra l-aggravji fid-dawl ta' dak li qalet il-Qorti tal-Appell u jiddeciedi jekk xi aggravju kienx gustifikat u jekk le, ir-raguni ghan-nuqqas ta' gustifikazzjoni.

Harsa lejn id-decizjoni tat-Tribunal pero, kontenuti fi ftit paragrafi, din il-Qorti ma ssib xejn x'jikkonfortaha illi t-Tribunal kif kompost ta' aditu ghas-sentenza tal-Qorti tal-Appell u minflok rega' injora l-aggravji tal-appellant u qies din l-applikazzjoni bhala simili ghal ohra cioe PA 5648/98 u qal li din tikkonsisti fl-istess mertu fuq l-istess sit, u hemm illegalita impunita. Billi ma hemmx gustifikazzjoni fil-policies ghas-sanzjonar ta' bini urban f'zona ODZ il-proposta kellha tigi rigettata.

Il-Qorti hi sorpriza b'din id-decizjoni ghax it-Tribunal b'hekk qed jipprolunga inaccettabilment vertenza, li kellu jiddeciedi skond dak lamentat minnha. Mhux qed jinghad li l-appellant ghandu ragun, izda li t-Tribunal hu obligat li b'sens ta' gustizzja, tigi applikata l-ligi ghal fattispecie u dan jinkludi li jinstemghu u jigu decizi l-lanjanzi tal-partijiet kemm jekk l-ezitu jkun favur jew kontra min qed jaghmel il-lanjanza.

F'dan il-kaz il-gudikat tal-Qorti tal-Appell waqa' fuq widnejn torox u l-Qorti ma ghandhiex ghazla hlief li tirrevoka d-decizjoni u tibghatha lura biex l-appell jigi deciz in linea mal-principju regolatur ta' kull appell cioe li t-Tribunal jiddeciedi skond il-ligi pero tenut kont tal-aggravji imressqa, kunsidrati u decizi b'mod konkret mit-Tribunal.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tilqa' l-appell tal-appellant in linea ma' dak deciz, tirrevoka d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ippjanar tad-29 ta' Novembru 2013, u tirrinviija l-atti lura lit-Tribunal biex jerga' jiddeciedi l-appell mill-gdid. Spejjez fic-cirkostanzi jibqghu bla taxxa.

< Sentenza Finali >

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